RECORD AND BRIEF

No. 16-980

Supreme Ct. U.S. FILED SEP 15 2017

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does Ohio's "Supplemental Process"—a list-maintenance program that relies only on a registrant's failure to vote during a two-year period as the basis for subjecting her to a process that results in the registrant's removal from the voter rolls unless she takes affirmative steps to retain her registration—violate Section 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20507, which prohibits any list-maintenance program that "result[s] in the removal of the name of any person from the official list of voters ... by reason of the person's failure to vote"?

CORPORATE DISCLOSURE STATEMENT

Respondent Ohio A. Philip Randolph Institute has no parent company, and no publicly traded company owns 10% or more of its stock.

Respondent Northeast Ohio Coalition for the Homeless has no parent company, and no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

Ohio assumes that a registered voter who has not voted or engaged in other voter activity for two years "may have moved." Directive 2015-09, R.42-2, PageID#1588. It directs county boards of elections to mail "confirmation notices" to all such voters, and to remove anyone who fails to respond to a single notice and fails to vote in the next four years. *See id.* PageID#1587-88, PageID#1591-92. Countless eligible voters across Ohio have been purged from the voter rolls pursuant to this so-called "Supplemental Process"—even where, as in the case of Respondent Larry Harmon, Ohio's own records show that the voter has not moved.

Section 8 of the National Voter Registration Act of 1993 ("NVRA"), 52 U.S.C. § 20507 ("Section 8"), protects registered voters against removal from the voter rolls simply for failing to vote and requires that, once registered, voters remain on the rolls so long as they are eligible to vote. Prior to the NVRA, states commonly purged registrants if they failed to vote and required them to re-register. Congress found that these and other "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office." *Id.* § 20501(a)(3).

The NVRA specifies that registrants may not be removed from the list of eligible voters except in five specific circumstances: when they have requested to be removed, been convicted of a crime, become mentally incapacitated, died, or moved out of the jurisdiction. *Id.* § 20507(a)(3)-(4). By removing people for failing to vote and

failing to respond to a notice, Ohio's Supplemental Process ignores this restriction, and violates subsection 8(a).

The NVRA also specifically prohibits "[a]ny State program or activity" that "result[s] in the removal ... of any person from the official list of voters registered to vote ... by reason of the person's failure to vote." *Id.* § 20507(b)(2). Congress reaffirmed this prohibition in the Help America Vote Act of 2002 ("HAVA"). As the Sixth Circuit correctly held, Ohio's Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." Appendix to Petition for Certiorari ("Pet. App.") at 24a. It therefore violates subsection 8(b).

Petitioner maintains that the Supplemental Process is authorized under subsection 8(d). But as the statute makes clear, subsection 8(d) sets forth a procedure that states must follow "to *confirm* [a registrant's] change of address" before removing her from the rolls; it is not a license to impose burdens on those who exercise their right not to vote but have not moved. 52 U.S.C. § 20507(c)(1)(B)(ii) (emphasis added).

Absent the decision below, the ballots of more than 7,500 eligible Ohioans would have gone uncounted in the November 2016 election. Pet. Br. at 14. None of these voters had become ineligible to vote by reason of a change in residence or otherwise; nonetheless, all had been purged from the rolls pursuant to the Supplemental Process. *See, e.g.*, Directive 2016-39, R.90-1, PageID#23354-55. That result is contrary to the language and purpose of the NVRA. This Court should affirm.

STATEMENT OF THE CASE

A. Historical Backdrop of the National Voter Registration Act of 1993

In enacting the NVRA, one of Congress's important goals was to eliminate "discriminatory and unfair registration laws and procedures." 52 U.S.C. § 20501(a)(3). Many states had "complex, cumbersome ... procedures" for voter registration, first imposed in the late nineteenth century in response to surging immigration and the enfranchisement of former slaves. Alexander Keyssar, *The Right to Vote*, at 85-86, 103-04, 252-54 (2009). These procedures dictated when and where people had to register, how frequently they had to re-register, and whether "the names of nonvoters were periodically 'purged'" from the rolls. *Id.* at 254; *see also id.* at 124. Procedures requiring voters to renew their registrations "whenever [they] failed to vote in an election ... sharply depressed turnout[.]" *Id.* at 124. Such requirements disproportionately disenfranchised "African-American, working-class, immigrant, and poor voters[.]" *Id.* at 253; *see also id.* at 124.

Even after passage of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. §§ 10101-10702, there remained a "complicated maze of local laws and procedures ... through which eligible citizens had to navigate in order to exercise their right to vote." H.R. Rep. No. 103-9, at 3 (1993). Some were "as restrictive as the ... practices" outlawed by the VRA. *Id.* States commonly purged registrants from the rolls if they failed to vote, "requir[ing] eligible citizens to re-register when they ha[d] chosen not to exercise their right to vote." S. Rep. No. 103-6, at 18 (1993). Some states

did so without notice, while others informed registrants their registrations would be cancelled if they did not respond to a notice. *See* Pet. Br. at 4 nn.1-2.

B. The National Voter Registration Act of 1993

In 1993, Congress passed the NVRA pursuant to its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1—which "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections," including "regulations relating to 'registration,'" *Arizona v. Inter Tribal Council of Ariz., Inc.* ("*ITCA*"), 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1952)). Congress recognized that the "failure to be[] registered is the primary reason given by eligible citizens for not voting." H.R. Rep. No. 103-9, at 3. It found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation ... and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). Congress therefore passed the NVRA to "increase the number of eligible citizens who register to vote," "enhance[] the participation of eligible citizens as voters in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b)(1), (2), (4).

The NVRA realizes these purposes by establishing a comprehensive national framework for voter registration in federal elections. First, it provides that states "shall establish procedures to register to vote" through motor vehicle offices, by mail, and through public assistance agencies. *Id.* §§ 20503-20506. Second, it makes voter

registration portable by requiring states to update a registrant's voter-registration address when she changes her address in connection with a driver's license or when she moves within the same registrar's jurisdiction. *See id.* §§ 20504(d), 20507(f).

Third, the NVRA sets forth requirements concerning the "administration of voter registration" lists. *Id.* § 20507. "[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 19. Section 8 requires that "each State shall ... ensure that any eligible applicant" who submits a voter registration application in accordance with the statute "is registered to vote." 52 U.S.C. § 20507(a)(1). And it limits how, when, and why registrants may be removed from the rolls. *See id.* § 20507(b)-(d).

Specifically, subsection 8(a) mandates that registrants may be removed from the rolls for only five specific reasons: (1) at the individual's request; (2) by reason of criminal conviction; (3) by reason of mental incapacity; (4) by reason of death; or (5) by reason of a change in residence. It provides, in relevant part,

> (a) ... each state *shall*—
>
> ...
>
> (3) provide that the name of a registrant *may not* be removed from the official list of eligible voters except—

> (A) at the request of the registrant;
>
> (B) as provided by State law, by reason of criminal conviction or mental incapacity; or
>
> (C) as provided under paragraph (4);
>
> (4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—
>
> (A) the death of the registrant; or
>
> (B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d).

Id. § 20507(a)(3)-(4) (emphases added). Thus, subsection 8(a) mandates that in adopting programs that aim "to remove ... ineligible voters ... by reason of ... a change in the residence of the registrant," states do not have unfettered discretion, but must conduct such programs "in accordance with subsections (b), (c), and (d)." *Id.* § 20507(a)(4)(B).

Subsection 8(b) then provides that "[a]ny State program or activity" to "ensure[] the maintenance of an accurate and current voter registration roll ... shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." *Id.* § 20507(b)(2). In enacting this broad prohibition, Congress

recognized that "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17. Congress found that while many states had used non-voting

> merely as an inexpensive method for eliminating persons believed to have moved or died, many persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities.

Id. at 17-18. Congress also found that these programs were "highly inefficient and costly" and "unnecessarily place[d] additional burdens on the registration system because persons who [were] legitimately registered must be processed all over again." *Id.* at 18.

Subsections 8(c) and 8(d) impose further restrictions on removal from the rolls for a change in residence. Subsection 8(c) provides that "a State may meet the requirement" of removing registrants who have become ineligible because of a change in residence by identifying "registrants whose addresses may have changed" using "information supplied by the Postal Service." 52 U.S.C. § 20507(c)(1)(A). However, even if "it appears from information provided by the Postal Service that" a registrant has "moved to a different residence address not in the same registrar's jurisdiction," states may not remove the registrant immediately. They must first "use[] the notice procedure described in subsection (d)(2) to confirm the change of address." *Id.* § 20507(c)(1)(B)(ii).

Subsection 8(d) establishes what Petitioner refers to as the "Confirmation Procedure," Pet. Br. at 7. It requires that a registrant be sent a notice "by forwardable mail" along with "a postage prepaid and pre-addressed return card ..., on which the registrant may state his or her current address." *Id.* § 20507(d)(2). Subsection 8(d)(1) mandates that a "State shall not remove the name of a registrant from the official list of eligible voters ... on the ground of changed residence unless" it follows this procedure and the registrant "has failed to respond to [the] notice," and "has not voted or appeared to vote ... in an election during the period beginning on the date of the notice and ending" after two federal election cycles have passed. *Id.* § 20507(d)(1)(B).

In sum, subsections 8(a), (b), (c), and (d) together establish that a registrant's failure to vote may be used only to confirm that she has "moved to a different residence address not in the same registrar's jurisdiction," and only after the voter has been sent a formal notice. *Id.* § 20507(a)-(d).

C. The Help America Vote Act of 2002

Congress passed the Help America Vote Act of 2002 ("HAVA") to "assist[] state and local government in modernizing their election systems." *See* H.R. Rep. No. 107-329, at 32 (2001). Two provisions of HAVA touch on the NVRA's prohibition on using failure to vote in list-maintenance programs.

HAVA amended subsection 8(b)(2) of the NVRA by adding what Congress expressly designated a "clarification." *See* Pub. L. No. 107-252, § 903, 116

Stat. 1666 (2002). As amended, subsection 8(b)(2) of the NVRA now reads:

> Any state program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll ... (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.*

52 U.S.C. § 20507(b)(2) (HAVA amendment in italics). As its title makes clear, this amendment was intended to clarify, but not alter, subsection 8(b)(2)'s prohibition on list-maintenance programs that rely on failure to vote. The amendment clarifies that the Confirmation Procedure constitutes a single exception to subsection 8(b)(2)'s prohibition: A list-maintenance program may result in removal by reason of failure to vote *only* where failure to vote is used to *confirm* the state's prior determination that a registrant may have become ineligible due to a change in residence, as specifically described in subsections 8(c) and 8(d).

HAVA subsection 303(a)(4)(A) similarly reaffirms the NVRA's requirements. Section 303 requires each state to establish a computerized statewide voter-registration database and maintain it "consistent with the [NVRA]." *Id.* § 21083(a). It also reaffirms the requirement that:

> registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

Id. § 21083(a)(4)(A). In adopting the NVRA's list-maintenance provisions, Section 303 does not expand the grounds for removal, which remain limited to those enumerated in subsection 8(a) of the NVRA.

Congress expressly provided that, with one exception not relevant here, HAVA was not intended to make any substantive changes to the NVRA: "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." *Id.* § 21145(a). The HAVA Conference Report re-emphasized that HAVA does not "undermine [the NVRA] in any way," and that the NVRA's procedures that "guard against removal of eligible registrants remain in effect under [HAVA]." H.R. Rep. No. 107-730, at 81 (2002) (Conf. Rep.).

D. Department of Justice Interpretation

Until it reversed its longstanding interpretation of the NVRA and filed its amicus brief in this Court, the

Department of Justice ("DOJ")—the agency tasked with enforcing the NVRA, *see* 52 U.S.C. § 20510—consistently took the position that the NVRA prohibits list-maintenance programs in which states simply assume non-voters have moved and send them subsection 8(d)(2) notices (and then remove them from the rolls if they do not respond and do not vote). In 1994, DOJ advised Georgia that its then-proposed program to "send[] a registration confirmation notice to persons who have not voted ... during a three-year period" was "directly contrary to the language and purpose of the NVRA." Br. for the United States as *Amicus Curiae* Supp. Pls.-Apps., *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. July 18, 2016), ECF No. 19 ("U.S. C.A. Br."), Attachment 2, at 1-2. In 1996, DOJ argued that Pennsylvania's law requiring that registrants who did not vote over a five-year period be sent a subsection 8(d)(2) confirmation notice "runs afoul of Section 8(b)(2)'s prohibition on purges for non-voting." *Id.*, Attachment 3, at 17.

In 1997, DOJ sent "notice-of-intent-to-sue letters to Alaska and South Dakota." *Id.* at 3. "Each state had adopted purging procedures that used nonvoting to trigger the Section 8(d) notice and cancellation process." *Id.* at 15. After receiving DOJ's letters, both states eliminated these procedures and adopted programs that require evidence of changed residence in the form of mail returned as undeliverable before the state initiates the subsection 8(d) Confirmation Procedure. *See* Alaska Stat. § 15.07.130(a)-(b); S.D. Codified Laws § 12-4-19.

Post-HAVA, DOJ continued to interpret and enforce Section 8 in the same way. In 2007, it obtained a stipulation with Cibola County, New Mexico, prohibiting placing

"the name of any voter on the inactive list or otherwise remov[ing] the voter's name from the official registration list solely by reason of the person's failure to vote." U.S. C.A. Br., Attachment 7, at 9. The settlement further required that registrants may be placed "on an inactive list" and targeted for eventual removal based *only* on "objective information indicating that the voter has become ineligible to vote due to having moved, such as returned mail with no forwarding address." *Id.*[1]

In 2010, DOJ issued NVRA guidance explaining that the subsection 8(d) Confirmation Procedure may be used only *after* a state receives "reliable second-hand information indicating a change of address outside of the jurisdiction" such as that provided by the Postal Service or when mail is returned to the sender as undeliverable. U.S. C.A. Br. at 15-16 (quoting then-effective DOJ guidance, ¶¶ 33-34).

In 2016, the United States filed a statement of interest in *Common Cause v. Kemp*, No. 16-cv-452 (N.D. Ga.

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[1] In a case challenging Philadelphia's failure to remove registrants on the ground of death (not changed residence), *see* U.S. C.A. Br., Attachment 10, the United States entered into a settlement allowing Philadelphia, like all other Pennsylvania jurisdictions, to comply with Pennsylvania law, by permitting the city to send a "forwardable confirmation notice to any registered elector who has not voted nor appeared to vote during any election, or contacted the Board in any manner, and whose contact resulted in a change in his or her voter record." *Id.*, Attachment 11, ¶ 16. DOJ never stated that this Pennsylvania law complies with Section 8; "to the contrary, the Department specifically argued in separate litigation ... that Pennsylvania's voter list maintenance procedures violated Section 8 for the same reason Ohio's does." *Id.* at 26.

Feb. 10, 2016), arguing that states may not "consider a registered voter's failure to vote to be reliable evidence that the voter has become ineligible by virtue of a change in residence, thus triggering the [subsection 8(d) Confirmation Procedure]." U.S. C.A. Br., Attachment 1, at 2. The United States maintained the same position in this case in the court below. *See infra* Statement of the Case ("SOC"), Part G.

E. State Practices

The NVRA substantially altered the way states maintain their rolls. At the time of the NVRA's passage, many states had statutes that required or permitted purging registrants for failure to vote, either with or without notice. *See* Pet. Br. at 4 nn.1-2. After the NVRA's passage, most of these states repealed or abandoned those programs.[2]

The NVRA itself provides various mandatory mechanisms to ensure voter roll accuracy. It requires that a change-of-address form submitted for purposes of updating a driver's license "shall serve as [a] change of

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[2] *See* 69 Del. Laws 481 (1993); 1994 Fla. Laws 1552-53; 1994 Iowa Acts 434; 1994 Md. Laws 1967; 1994 N.J. Laws 1302-03; 1994 N.Y. Laws 3503-04; 1994 R.I. Pub. Laws 906; 1994 Wash. Sess. Laws 197; 1995 Ark. Acts 4253-54; 1995 Ind. Acts 1510; 1995 Nev. Stat. 2279-80; 1995 Utah Laws 475; 1996 S.C. Act 3688; 1996 Va. Acts 91; 1997 Vt. Acts & Resolves 190-92; 1998 Alaska Sess. Laws Ch. 63:1-2; 1998 S.D. Sess. Laws. Ch. 79 § 1-138; 2000 Miss. Laws 378; 2001 Mich. Pub. Acts 1663; 2001 N.C. Sess. Laws 946; 2008 N.M. Laws 792; 2013 Colo. Sess. Laws 700-02; 2017 Tenn. Pub. Acts Ch. 245 1-2; Ill. Admin. Code tit. 26, § 216.50; Haw. Code R. § 3-172-26.

address for voter registration," 52 U.S.C § 20504(d); that state agencies distribute a voter-registration form "with each ... change of address form relating to [disability] service[s] or [public] assistance," *id.* § 20506(a)(6)(A); and that "[i]n the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly," rather than removing the registrant, *id.* § 20507(f).

Most states also update voter lists by obtaining direct evidence of changed residence and then confirming that information with the Confirmation Procedure. At least 35 states permit or require use of information from the Postal Service regarding changed residence, consistent with subsection 8(c)(1).[3] At least 12 states send list-maintenance mailings to all or some registrants, and treat *those returned as undeliverable* as evidence of

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[3] *See, e.g.*, Ariz. Rev. Stat. § 16-166(E); Ark. Const. amend. 51 § 10(d); Cal. Elec. Code §§ 2222, 2225; Colo. Rev. Stat. § 1-2-302.5; Conn. Gen. Stat. § 9-32; D.C. Code § 1-1001.07(j)(1)(D); Fla. Stat. § 98.065(2)(a); Ga. Code § 21-2-233; Ind. Code § 3-7-38.2-2(c)(1); Iowa Code § 48A.27(4); Kan. Stat. § 25-2316c(e)(2); Ky. Rev. Stat. § 116.112; La. Stat. § 18:192(A); 29-250-505 Me. Code R. § 1(2)(C); Md. Code, Elec. § 3-502(c); Mich. Comp. Laws § 168.509aa; Mo. Stat. §§ 115.179, 115.181; Mont. Code § 13-2-220(1)(a); Neb. Rev. Stat. § 32-329; Nev. Rev. Stat. §§ 293.5303, 293.5307; N.J. Stat. § 19:31-15; N.M. Code R. § 1.10.35.9(A)(1); N.Y. Elec. Law § 5-712(2); N.C. Gen. Stat. § 163-82.14(a); Ohio Rev. Code § 3503.21(B); Okla. Stat. tit. 26, §§ 4-118.1, 4-120.2(A)(4); Or. Rev. Stat. §§ 247.292(1)(b), 247.295, 247.563; 25 Pa. Cons. Stat. § 1901(b)(1)(i); 17 R.I. Gen. Laws § 17-9.1-27(a); S.D. Codified Laws § 12-4-19; Tenn. Code § 2-2-106(c); Tex. Elec. Code §§ 15.022(a)(6), (b), 15.051; Va. Code § 24.2-428; Wash. Rev. Code § 29A.08.620(1), (4)(b); W. Va. Code § 3-2-25(d), (e).

changed residence for follow-up with the Confirmation Procedure.[4] Other states permit obtaining evidence of changed residence through door-to-door canvasses,[5] or through interstate data-sharing programs for driver's-license[6] and voter-registration information.[7]

F. Ohio's Supplemental Process

Ohio is one of the very few states retaining a purge program that assumes failure to vote indicates a

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[4] *See, e.g.*, Ala. Code § 17-4-30(a) (all registrants); Ariz. Rev. Stat. § 16-166(A) (general mailings to all registrants); Cal. Elec. Code § 2200 (all registrants); Colo. Rev. Stat. § 1-2-605(1); D.C. Code § 1-1001.07(j)(1)(A) (registrants who did not vote in two-year cycle); Fla. Stat. § 98.065 (all registrants or only non-voters); Iowa Code § 48A.28(2) (registrants who have not voted in two or more consecutive elections); Ind. Code § 3-7-38.2-2 (all active voters); 29-250-505 Me. Code R. § 1(2)(B) (registrants who have not voted in the most recent general election); Neb. Rev. St. § 32-329 (all registrants); N.M. Code R. 1.10.35.9 (same); Tenn. Code § 2-2-106(c)(1) (same); Wash. Rev. Code § 29A.08.620 (same).

[5] *See, e.g.*, Conn. Gen. Stat. § 9-32(a); Mass. Gen. Laws ch. 51, §§ 4(a), 37.

[6] *See, e.g.*, Del. Code tit. 15, § 1704 (identify registrants who have obtained driver's license or state identification in new state); Ind. Code § 3-7-38.2-2 (same).

[7] According to Petitioner, 20 states participate in the Electronic Registration Information Center ("ERIC") system, which "uses a combination of public and private data to help states more accurately identify voters who have moved or died so the voter rolls can be appropriately updated." Ohio Sec'y of State, Secretary Husted Announces National Partnership to Increase Voter Registration, Improve Voter Rolls (June 14, 2016), https://www.sos.state.oh.us/media-center/press-releases/2016/2016-06-14/.

registrant has moved, and sends subsection 8(d)(2) notices to registrants on that basis alone.[8]

Under Ohio law, a voter's registration "shall be canceled upon ... [t]he change of residence of the registered elector to a location outside the county of registration...." Ohio Rev. Code § 3503.21(A)(6). Petitioner uses two list-maintenance programs to identify registrants who may have become ineligible to vote by reason of a change in residence. *E.g.*, Directive 2015-09, R.42-2, PageID#1587-88. One conforms to the NVRA's subsection 8(c) program, using Postal Service change-of-address information, and is established by statute. *See* Ohio Rev. Code § 3503.21(B)(1).

The other is the Supplemental Process, which is not set forth by statute and was instead created by the Ohio Secretary of State through a series of directives. The Supplemental Process "seeks to identify electors whose lack of voter initiated activity indicates they may have moved." Directive 2015-09, R.42-2, PageID#1588. It directs county boards of elections to send confirmation notices to registrants based solely on a failure to vote for a two-year period, and to remove any registrant who fails to respond to the notice and fails to engage in voter activity in the subsequent four years. *See id.* PageID#1587-88, PageID#1591-92.[9]

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[8] Six states maintain statutorily-mandated programs along these lines. *See* Ga. Code §§ 21-2-234, 21-2-235; Mont. Code § 13-2-220; Okla. Stat. tit. 26, § 4-120.2; Or. Rev. Stat. § 247.013; 25 Pa. Cons. Stat. § 1901(b)(3); W. Va. Code §§ 3-2-25, 3-2-26.

[9] From 1994 to 2014, this program was deployed every two years. In 2014, Petitioner, without guidance from the state legislature, entered into an out-of-court settlement with private groups requiring

"When this litigation began, the confirmation notices ... required that voters provide their name, current Ohio address, date of birth, and either their Ohio driver's license number, their Social Security number, or a copy of a document verifying their identity and address ... regardless of whether they had changed address or were merely confirming that they still lived at the same address." Pet. App. at 5a-6a. As a result of this lawsuit, Petitioner promulgated a new confirmation notice form that requires registrants who have not changed their address to confirm their registrations by signing, dating, and returning the form. *Id.* at 6a.

The Supplemental Process purged eligible Ohio voters, including Respondent Larry Harmon, a U.S. Navy veteran and registered Ohio voter who has resided at the same address for more than 16 years. *See* Harmon Decl., R.9-4, ¶¶ 2-3. After voting in the 2008 presidential election, Mr. Harmon opted not to vote in 2009 or 2010. *Id.* ¶ 6. Although Ohio's records indicate Mr. Harmon was sent a confirmation notice in June 2011, he does not recall receiving it, *id.* ¶ 10. In the subsequent four years, Mr. Harmon expressed his dissatisfaction with the candidates by exercising his right not to vote. *Id.* ¶ 6. In September 2015, Mr. Harmon's registration was cancelled pursuant to the Supplemental Process, even though he had not changed his residence or otherwise become ineligible to vote. Mr. Harmon did not learn that he had been purged from the rolls until he went to vote in Ohio's November 2015 election and discovered he was not registered and that his vote would therefore not be counted. *Id.* ¶¶ 8-11.

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that the Supplemental Process be undertaken annually. Settlement Agreement, *Judicial Watch v. Husted*, R.38-4, PageID#370.

Many registrants across Ohio have been similarly disenfranchised. A preliminary review of several of Ohio's 88 counties uncovered over 600 eligible voters whose provisional ballots went uncounted in just the November 2015 and March 2016 elections because they had been purged under the Supplemental Process even though they had *not moved* and *remained eligible to vote*. Pls.' Mot. for Summ. J., R.39, PageID#1386-88.[10] A Reuters analysis found that, in Ohio's most populous counties, "neighborhoods that have a high proportion of poor, African-American residents are hit hardest" by the Supplemental Process. *See* Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, Reuters, June 2, 2016, http://www.reuters.com/article/us-usa-votingrights-ohio-insight-idUSKCN0YO19D.

G. Proceedings Below

On April 6, 2016, Respondents filed suit in the U.S. District Court for the Southern District of Ohio. Complaint, R.1. On June 29, 2016, after limited discovery and briefing, the district court granted judgment in favor of Petitioner. Pet. App. at 69a-70a.

Respondents filed a notice of appeal to the Sixth Circuit the next day. Notice of Appeal, R.68. Given the impending presidential election, the Sixth Circuit ordered expedited briefing and argument. Order, *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. July 6, 2016), ECF No. 14-1. The United States filed an *amicus* brief supporting

[10] Due to the impending election, the parties agreed to limited discovery. Respondents were therefore not able to determine the full number of eligible persons denied the right to vote.

Respondents, arguing that Section 8—"when construed in light of its text, structure, purpose, and history—requires that before a State can start the confirmation process that leads to removal of voters from its voter registration rolls based on a change of residence, it must have reliable evidence that the voter has moved," and that "[d]eclining to vote does not provide such evidence." U.S. C.A. Br. at 8. The United States further asserted that "triggering the confirmation process based solely on voter inactivity, as Ohio does through its Supplemental Process, inevitably results in the removal of voters based on nonvoting, which violates the NVRA and HAVA." *Id.* "Because it is a *confirmation* process, Section 8(d) requires some *initial* evidence that a voter has moved. Without some initial evidence of a change in residence, there would be nothing to confirm." *Id.* (emphasis added).[11]

On September 23, 2016, the Sixth Circuit reversed the district court. It observed that under subsection (8)(a) of the NVRA, "a registrant *may not* be removed from the official list of eligible voters *except*" under one of the five grounds enumerated in that subsection, including a registrant's change in residence to another jurisdiction. Pet. App. at 11a (quoting 52 U.S.C. § 20507(a)(3)). It further noted that subsection 8(b) prohibits any state program or activity that "result[s] in the removal" of any registrant "by reason of the person's

[11] On August 2, 2017, citing the recent "change in Administrations," the United States reversed the interpretation of Section 8 that it had consistently maintained under both Democratic and Republican administrations for over two decades, and filed a brief in support of Petitioner. U.S. Br. at 14. On the same day, DOJ altered its online NVRA guidance to align with the new position asserted in the United States' brief. *Id.* at 14 n.4.

failure to vote." *Id.* at 11a-12a. The Sixth Circuit concluded that the Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote" and therefore violates Section 8. *Id.* at 24a.[12]

On remand, the district court ordered relief applicable only to the November 2016 election, requiring Ohio to count the ballots of any voters removed under the Supplemental Process between 2011 and 2015 who voted a provisional ballot in person, so long as the voter had not become ineligible through a change in residence or otherwise. *Id.* at 94a-100a.

As a result of this relief, the votes of at least 7,515 eligible Ohioans were counted in the November 2016 election. Pet. Br. at 14. Had the Supplemental Process not been enjoined, these indisputably eligible voters would have been disenfranchised. Moreover, this number understates the full impact: it does not include any purged voter who attempted to vote by mail, learned she had been purged and did not try to vote, appeared at the polls but left without casting a provisional ballot, successfully re-registered before the election, or decided not to vote in 2016.

After the election, the parties resumed litigation concerning remedial issues.

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[12] The Sixth Circuit did not analyze Respondents' alternative claim that the Supplemental Process erroneously removes many eligible voters, thereby violating Section 8's requirement that states' efforts to remove registrants who have become ineligible by reason of changed residence be reasonable. *See* Pet. App. at 23a-24a.

When this Court granted certiorari, the parties stipulated to a stay of the district court proceedings pending resolution of the issues before this Court. As part of this stipulation, Petitioner agreed to continue to abide by the interim relief that was in place in November 2016 for all elections occurring while the case is before this Court. Order, R.118, PageID#23915.

SUMMARY OF THE ARGUMENT

I. Ohio's Supplemental Process violates Section 8 of the NVRA.

A. Subsection 8(a) of the NVRA permits states to remove registrants from the voter rolls for only five expressly delineated reasons. 52 U.S.C. § 20507(a)(3)-(4). Neither failure to vote nor failure to respond to a notice—which Petitioner contends is the "sole proximate cause" of a registrant's removal under the Supplemental Process, Pet. Br. at 14—is one of them. The Supplemental Process therefore violates subsection 8(a).

B. Subsection 8(b) of the NVRA further prohibits states from employing any "program or activity" for voter-roll maintenance that "result[s] in" removal of a registrant "by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). "A thing 'results' when it '[a]rise[s] as an effect, issue, or outcome from some action, process or design.'" *Burrage v. United States*, 134 S. Ct. 881, 887 (2014) (citation omitted). Subsection 8(b) thus broadly prohibits programs that have the "effect" or "outcome" of removing registrants by reason of their failure to vote, even when that is not the immediate, intended, or expressly stated reason for removal. The

Supplemental Process plainly has the effect or outcome of removing registrants "by reason of" their failure to vote. Registrants are subjected to the Supplemental Process based solely on their failure to vote in a single federal election period, and they are then purged based in part on their failure to vote in two more federal elections.

Borrowing from inapposite statutory-tort cases, Petitioner incorrectly argues that subsection 8(b) prohibits list-maintenance programs only where non-voting is the "proximate cause" of removal. Petitioner's proximate-cause analysis is inapplicable here. Regardless, failure to vote *is* the proximate cause of removal under the Supplemental Process, because non-voters are singled out for failing to vote, sent confirmation notices, and then removed as a direct result of their failure to vote—without any affirmative evidence that they have changed residence or otherwise become ineligible.

C. HAVA's amendment to Section 8 of the NVRA clarified that subsection 8(b)'s prohibition on programs that "result in removal ... by reason of the person's failure to vote" does not "prohibit a State from using the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2). But the Supplemental Process is not saved by this exception because it relies on failure to vote in a way not "described in subsections (c) and (d)." *Id.* It is therefore barred by subsection 8(b).

Subsection 8(d), which Petitioner concedes is a "Confirmation Procedure," Pet. Br. at 7, sets forth a specific notice procedure, used only to "confirm" that a registrant has become ineligible to vote due to a change in residence. 52 U.S.C. § 20507(c)(1), (d). Under the

procedure described in subsection 8(d), failure to vote may be considered at *one* point in the removal process, *after* a notice has been sent.

The Supplemental Process, by contrast, uses failure to vote not once, to *confirm* a change in residence after a notice has been sent, but twice. It also uses failure to vote to *determine initially* that a registrant "may have moved," Directive 2015-09, R.42-2, PageID#1588, simply because she has not voted in a single federal election cycle. Because it uses failure to vote in a way not "described in subsections (c) and (d)," 52 U.S.C. § 20507(b)(2), it falls outside of subsection 8(b)(2)'s exception and is prohibited.

II. HAVA reaffirms that the Supplemental Process violates Section 8 of the NVRA.

A. Petitioner's contention that HAVA "limit[s] the ... scope" of the NVRA, Pet. Br. at 21, is belied by HAVA's text, which makes plain that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to *supersede, restrict, or limit* the application of [the NVRA]." *Id.* § 21145(a) (emphasis added). Instead, HAVA's amendment to subsection 8(b) of the NVRA merely clarifies that the prohibition on programs that result in removing registrants by reason of their failure to vote does not proscribe the procedures described in subsections 8(c) and 8(d). As described above, that does not authorize the Supplemental Process.

B. Section 303 of HAVA reaffirms that voters may not be removed for failure to vote. It restates the requirements set forth in more detail in Section 8 of the NVRA, but by its own terms does not alter or supersede those provisions.

C. HAVA's legislative and implementation history confirms this conclusion. Petitioner cites reports from the Federal Election Commission ("FEC") to Congress in the years before HAVA was enacted, but ignores the FEC report to the very Congress that enacted HAVA reflecting its view that states could not rely on failure to vote alone to subject registrants to the subsection 8(d) Confirmation Procedure.

III.A. Interpreting the NVRA to prohibit Ohio from employing the Supplemental Process raises no constitutional concerns. This Court has repeatedly stated that prescribing voter-registration requirements falls within Congress's authority under the Elections Clause. And prohibiting the Supplemental Process does not prevent the State from enforcing its voter qualifications.

B. Applying the text of the NVRA also does not trigger the clear-statement rule or raise federalism concerns. The NVRA leaves the states considerable flexibility in how they maintain their voter rolls; it simply prohibits a narrow category of list-maintenance activities that, like the Supplemental Process, result in registered voters being removed for exercising their right not to vote.

This Court should affirm.

ARGUMENT

I. OHIO'S SUPPLEMENTAL PROCESS VIOLATES SECTION 8 OF THE NVRA.

Section 8 of the NVRA bars the Supplemental Process, under which a registrant who fails to vote during

a single federal election cycle is removed unless she takes affirmative steps to stay on the rolls. This program cannot be reconciled with the text, structure, or purposes of the NVRA.

A. Failure to Respond to a Confirmation Notice and Failure to Vote Are Not Among the Permissible Grounds for Removal under Subsection 8(a).

Subsection 8(a) requires states to "ensure that any eligible applicant" who submits a voter-registration application in accordance with the statute "is registered to vote." It then limits removal of registrants to five exclusive circumstances. 52 U.S.C. § 20507(a). It provides "that the name of a registrant *may not* be removed from the official list of eligible voters *except*": (1) "at the request of the registrant;" or because the registrant has become ineligible to vote due to (2) a criminal conviction, (3) mental incapacity, (4) death, or (5) a change in residence. *Id.* § 20507(a)(3)-(4) (emphasis added). As the mandatory language "may not" makes plain, removal of a registrant on any other grounds is prohibited. *See Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) ("may not" is a mandatory statutory command).

The Supplemental Process does not remove registrants on any of the five grounds specified in subsection 8(a). The parties disagree about whether the Supplemental Process removes a registrant "by reason of his or her failure to vote" (as the Sixth Circuit held, Pet. App. at 24a), or whether "the failure to respond to a notice is the sole proximate cause of removal" (as Petitioner argues, Pet. Br. at 24). But neither failure to vote, nor failure to

respond to a notice—nor the two together—is among the grounds for removal under subsection 8(a). In fact, Congress specifically sought to prohibit list-maintenance programs that "result in the removal of the name of any person from the official list because of a failure to vote," *and* those that "result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing." H.R. Rep. No. 103-9, at 15. The Supplemental Process therefore violates subsection 8(a).

In response, Petitioner maintains that there is "good reason not to read § 20507(a)(3) as containing the *exclusive* justifications for removal," because such a reading could prevent states from removing individuals who register unlawfully, such as "minors, fictitious individuals ... and noncitizens." Pet. Br. at 34. That is incorrect. Subsection 8(a)(1) requires states to "ensure that any *eligible* applicant is registered," and subsections 8(a)(3) and (4) only limit the removal of such "registrants." 52 U.S.C. § 20507(a)(1), (3)-(4) (emphasis added). Petitioner notes that the use of the term "registrant," shows that subsections 8(a)(3) and (4) "cover only those who were lawfully included on the rolls *at the time* they registered." Pet. Br. at 34 (emphasis in original). Individuals who were not eligible to vote when they applied to register are not lawfully on the rolls and may be removed. But someone lawfully registered under subsection 8(a)(1) may be removed only for one of the five reasons enumerated in subsection 8(a).

Because it removes lawfully registered individuals for a reason not among those enumerated in subsection 8(a), the Supplemental Process is prohibited.

B. Subsection 8(b) Prohibits List-Maintenance Programs that, Like the Supplemental Process, Result in the Removal of Registrants by Reason of Their Failure to Vote.

Under subsection 8(b):

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll ... (2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote ....

52 U.S.C. § 20507(b).[13] Importantly, subsection 8(b)(2) prohibits not just removals "by reason of" failure to vote, but "[a]ny State program or activity" that "*results in*" removal of a voter "by reason of the person's failure to vote." *Id.* (emphasis added). "A thing 'results' when it '[a]rise[s] as an effect, issue, or outcome *from* some action, process or design.'" *Burrage*, 134 S. Ct. at 887 (citing 2 The New Shorter Oxford English Dictionary 2570 (1993)) (emphasis and alterations in original).

By way of comparison, subsection 8(b)(2)'s "results in" language is broader than that of subsection 8(a), which permits registrants to be removed "by reason of" felony

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[13] The sole exception to this—which is not applicable to the Supplemental Process, *see infra* Part I.C.—is when a state is "using the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2).

conviction, mental incapacity, death, or changed residence, without using the phrase "results in." When interpreting statutes, courts "presume [that] differences in language ... convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (citing *Loughrin v. United States*, 134 S. Ct. 2384, 2391 (2014)). The most plausible reading of the different language used in these provisions is that subsection 8(b) broadly prohibits list-maintenance programs that have the "effect" or "outcome" of removing registrants by reason of their failure to vote, even if that is not the immediate, intended, or expressly stated reason for removal.

1. The Supplemental Process Violates Subsection 8(b) Because It "Results in" Removal of Registrants "by Reason of" Their Failure to Vote.

The Supplemental Process plainly has the effect or outcome of removing registrants "by reason of" their failure to vote. Ohio subjects registrants to the Supplemental Process based solely on their failure to vote in a single federal election period—with no evidence that they have moved to another jurisdiction or otherwise become ineligible—and their registrations are cancelled unless they take affirmative steps to stay on the rolls. As the Sixth Circuit correctly held, this is "perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from rolls by reason of his or her failure to vote." Pet. App. at 24a.

Petitioner contends that the Supplemental Process uses non-voting to identify registrants who "may have moved." Pet. Br. at 10 (quoting Directive 2009-05,

R.38-7). A change in residence outside the voting jurisdiction is indeed one of the valid reasons for removal under subsection 8(a). But states cannot overcome subsection 8(b) simply by characterizing failure to vote as the equivalent of one of the permissible grounds for removal. Such a reading would leave subsection 8(b) with no meaningful force or effect, and is prohibited by the rule against "'interpret[ing] federal statutes to negate their own stated purposes.'" *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 420 (1973)).[14]

Petitioner suggests that his reading would not leave subsection 8(b)(2) without effect because that section only "bars States from using nonvoting as the sole proxy to conclude that a registrant is ineligible for *other reasons* (e.g., death)," not for a change in residence. Pet. Br. at 15-16; *see also* U.S. Br. at 24-25. But subsection 8(b) does not say that. It says it broadly applies to

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[14] The United States also ignores subsection 8(b)(2)'s "results in" language, arguing that, by prohibiting removal "by reason of" failure to vote, subsection 8(b)(2) merely makes "explicit" what is already "implicit[]" in subsection 8(a)'s prohibition on removing registrants except "by reason of" the express grounds of ineligibility. U.S. Br. at 24-25 n.7. Not only does this argument ignore subsection 8(b)'s much broader language; it relies on a disfavored "belt-and-suspenders" reading of the statute. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are reluctant to treat statutory terms as surplusage in any setting." (internal citations and quotation marks omitted)); *see also United States v. Smith*, 756 F.3d 1179, 1187 (10th Cir. 2014) (Courts are not "entitled to reach [the] conclusion [that legislatures employ redundant language] lightly. Respect for democratic authority requires unelected federal judges to exercise great caution before declaring the words enacted by the people's representatives to be superfluous.").

"[a]ny State program or activity" for list maintenance, 52 U.S.C. § 20507(b) (emphasis added), and subsection 8(a)(4) specifically provides that removals due to "a change in the residence of the registrant" must be conducted "in accordance with subsections (b), (c), *and* (d)." *Id.* § 20507(a)(4)(B) (emphasis added).

In addition to finding no support in the statutory text or in logic, Petitioner's reading would also contravene Congress's intent in four ways. First, it would conflict with Congress's recognition that "while voting is a right, people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17. Treating failure to vote as a proxy for changed residence subjects those who exercise their right not to vote to a burden not faced by other voters. Second, it flouts Congress's concern that using "non-voting ... as an inexpensive method for eliminating persons believed to have moved or died" inevitably results in removal of some individuals who in fact "may not have moved or died" and remain eligible to vote in the jurisdiction. *Id.* Third, the erroneous removal of eligible registrants contravenes the NVRA's purposes of "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)-(2). And fourth, it undermines the NVRA's express goals of "protect[ing] the integrity of the electoral process" and "ensur[ing] ... accurate and current voter registration rolls," *id.* § 20501(b)(3)-(4), because it results in "persons who are legitimately registered" not being included on the rolls, S. Rep. No. 103-6, at 18.

Failure to vote for a mere two-year period does not indicate that a registrant has moved out of the jurisdiction.

In recent midterm elections, more than half of registered voters in Ohio have not voted.[15] There is no basis to conclude that more than half of Ohio's registered voters change residence outside the jurisdiction and thereby become ineligible in the two years following a presidential election.

Petitioner makes no showing that non-voting is a reliable indicator that a registrant has moved, nor could he. Registrants may sit out elections for any number of reasons. They may be unable to vote during the allotted hours, lack access to transportation, or suffer from an illness or disability that prevents them from getting to the polls. Like Mr. Harmon, they may not be inspired by the candidates or issues in a particular election. Indeed, but for the decision below, thousands of eligible voters—whose registrations had been cancelled on the incorrect assumption that their inactivity indicated they were no longer eligible—would have been erroneously disenfranchised in the November 2016 election. *See* Pet. Br. at 14.

2. Proximate Cause Is Not Required.

Petitioner argues that for a removal program to violate subsection 8(b)(2), non-voting must "be the proximate cause of removal." Pet. Br. at 14. That is incorrect.

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[15] For example, in the 2014 general election, nearly 60% of registered Ohio voters did not vote. *See* Ohio Sec'y of State, *Voter Turnout in General Elections*, https://www.sos.state.oh.us/elections/election-results-and-data/historical-election-comparisons/voter-turnout-in-general-elections (last visited September 13, 2017).

As an initial matter, Petitioner ignores the critical "results in" language discussed above, which establishes that subsection 8(b)(2) prohibits any state program that has the "effect" or "outcome" of a registrant being removed by reason of her failure to vote. *See supra* Part I.B.

And even if it were appropriate to ignore the "results in" language and focus only on the words "by reason of," the three cases Petitioner cites that have read the words "by reason of" to incorporate a common-law proximate-cause requirement all concerned statutory claims that sound in tort or that expressly incorporated background principles of tort or criminal law. They are not applicable here.

"Proximate cause is a standard aspect of causation in criminal law and the law of torts." *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014). "In a philosophical sense, the consequences of an act go forward to eternity," so to prevent "infinite liability," proximate cause places "limits on the chain of causation that may support recovery on any particular claim." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011) (internal quotation marks omitted).

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 (1983), the Court considered Section 4 of the Clayton Act, which provides a private damages action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." The Court found that a "literal reading of the statute [was] broad enough to encompass every harm" that could possibly be attributed to an antitrust violation. But, in

enacting Section 4, Congress used the same language as it had in Section 7 of the Sherman Act, and courts had consistently interpreted Section 7 as incorporating background common-law principles of proximate cause. *Id.* at 529-36; *see also Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 266-68 (1992) (applying the same analysis to the treble damages provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which Congress modeled on Section 4 of the Clayton Act and Section 7 of the Sherman Act).[16]

Private causes of action under the antitrust laws and RICO are akin to statutory torts. The NVRA, however, has nothing to do with tort law, and its "by reason of" language appears not in a private right of action (for damages or otherwise), but in its rules governing state voter-registration procedures for federal elections. Therefore, background common-law principles applicable in the context of tort claims or criminal law have no application when interpreting the NVRA, which must be construed in accordance with its plain language.

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[16] *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 (2010), on which Petitioner relies, also involves RICO's tort-like liability and is therefore inapposite here. Moreover, while the Court "ma[d]e clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm," it also acknowledged that there were many other "shapes" of proximate cause "at common law." *Id.* at 12.

3. Failure to Vote Is a Proximate Cause of Removal Under the Supplemental Process.

Even if proximate cause were required, failure to vote is a proximate cause of removal under the Supplemental Process. "Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct. A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline*, 134 S. Ct. at 1719 (internal citations omitted).

Here, the causal link between a registrant's failure to vote and her removal from the rolls cannot be "described as mere fortuity." It is foreseeable, even predictable, that a registrant may not respond to a single notice sent by mail—particularly when that person's address had not changed and she therefore had no new information to provide to the registrar. The only reason a registrant targeted by the Supplemental Process is sent a notice is because she has failed to vote. Thus, the failure to respond is an utterly foreseeable consequence of the registrant's failure to vote.

Petitioner's assertion that "failure to respond to a notice—not a failure to vote—is the sole proximate cause of removal under Ohio's Supplemental Process," Pet. Br. at 14, is incorrect. "[I]t is common for injuries to have multiple proximate causes." *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011). Under the Supplemental Process, a registrant is removed if she (1) fails to vote during a two-year period, (2) fails to respond to a notice, and (3) fails to

vote during the subsequent four-year period. Petitioner's insistence that the middle event—failure to respond to a notice—is the *sole* proximate cause of removal, to the exclusion of both a registrant's initial failure to vote (which starts the Supplemental Process) and her subsequent failure to vote (which concludes it), lacks any support in logic or law.

Petitioner's attempt to analogize a voter's failure to respond to a confirmation notice to "gallop[ing] violently ... into a pole," as a kind of "contributory negligence," Pet. Br. at 24-25 (internal quotation marks omitted), is even further afield. The NVRA is not a tort statute designed to allocate liability. Moreover, it makes the state, not the voter, responsible for ensuring that only registrants who have become ineligible are removed from the rolls.

Ultimately, Petitioner contends that a registrant who exercises the right not to vote in a single federal election period incurs an obligation to take affirmative measures to stop the state from purging her, even when there has been no change in her eligibility. But that construction of the NVRA allows states to "penalize such non-voters ... merely because they have failed to cast a ballot in a recent election"—a choice that Congress sought to protect. S. Rep. No. 103-6, at 17.

Finally, Petitioner argues that, because the Supplemental Process employs the subsection 8(d) Confirmation Procedure—which expressly "*requires* States to rely on the failure to vote to remove registrants"—"the Court must read 'by reason of' in such a way that the Confirmation Procedure's required use of nonvoting is not a proximate cause of removal prohibited by the Failure-To-

Vote Clause." Pet. Br. at 24 (emphasis in original). There is no need for the Court to resort to a cramped reading of the statute to reconcile these provisions, however. As explained below, *see infra* Part II, Congress addressed that question in HAVA, where it clarified that subsection 8(b) prohibits any program that results in the removal of registrants by reason of their failure to vote "except ... the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2); *see also id.* § 20507(a)(4) (requiring removals for changed residence to comply with "subsections (b), (c), *and* (d)") (emphasis added). As explained below, the Supplemental Process is not authorized by subsections 8(c) or 8(d).

C. The Supplemental Process Impermissibly Uses Failure to Vote in a Way Not "Described in" Subsections 8(c) and 8(d).

As amended by HAVA, subsection 8(b)(2) prohibits programs that "result in removal of [a registrant] by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d)." 52 U.S.C. § 20507(b)(2). Subsections 8(c) and 8(d), in turn, set forth procedures and restrictions governing removals by reason of changed residence. The Supplemental Process does not use failure to vote only as described in subsections 8(c) and 8(d) and therefore does not satisfy the exception to subsection 8(b)'s prohibition.

1. Subsections 8(c) and 8(d) Permit Consideration of Failure to Vote Only to Confirm a Change in Residence, Not to Identify Registrants Who Have Moved.

Subsection 8(b)'s "except" clause provides that the general prohibition on programs and activities that result in removal by reason of failure to vote does not prohibit "a State from using the procedures described in subsections (c) and (d)." *Id.* By including this specific and narrow exception, Congress made clear that subsection 8(b) prohibits all programs or activities that use failure to vote in a manner not described in subsections 8(c) and 8(d). *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied ...." (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–617 (1980))). The Supplemental Process's use of failure to vote, however, is consistent with neither of these subsections.

Subsection 8(c) permits states to remove registrants based on changed residence where they obtain evidence of a change of address from the Postal Service *and* then "confirm" it using the subsection 8(d) Confirmation Procedure. 52 U.S.C. § 20507(c)(1)(B)(iii). Ohio does not contend that the Supplemental Process uses the procedure described in subsection 8(c), nor could it: The Supplemental Process uses no Postal Service information.

Subsection 8(d) allows states to consider failure to vote only as part of a carefully specified Confirmation Procedure, *after* a state has grounds for determining that a registrant may be ineligible due to a change in residence,

and *after* the state sends the voter a confirmation notice. The procedure described in subsection 8(d) does not authorize states to treat failure to vote as evidence that the registrant may have moved *before* sending that individual a confirmation notice.

As Petitioner himself concedes, subsection 8(d) is a "Confirmation Procedure." Pet. Br. at 7-8. The statute requires states to use the "procedure described in subsection (d)(2) to *confirm* the change of address" before a registrant may be removed under subsection 8(c). 52 U.S.C. § 20507(c)(1)(B)(ii) (emphasis added). To "confirm" means "[t]o corroborate, or add support to (a statement, etc.); to make certain, verify, put beyond doubt." Oxford English Dictionary (2d ed. 1989). As a procedure for confirming a change in residence, subsection 8(d) presupposes that a state already has information indicating that the registrant has moved out of the jurisdiction, which it then seeks to "verify" or "corroborate" through subsection 8(d)'s Confirmation Procedure. This understanding of subsection 8(d) is reflected in the NVRA's legislative history. *See* S. Rep. No. 103-6, at 39 ("The bill would permit a state, *if it determines a voter has moved*, to remove the voter from the list *only after* sending a forwardable notice....") (emphasis added); *see also* H.R. Rep. No. 103-9, at 16 (same). Likewise, until its eleventh-hour reversal in this Court, the United States had consistently argued that, as a *confirmation* procedure, subsection 8(d) may be used only when a state has obtained evidence that a voter has moved. *See, e.g.*, U.S. C.A. Br. at 8 ("Without some initial evidence of a change in residence, there would be nothing to confirm.").

Thus, subsection 8(b) prohibits programs that result in removal by reason of failure to vote, but with a limited exception permitting states to consider failure to vote as part of the Confirmation Procedure described in subsection 8(d), after a state has determined that a registrant may be ineligible due to changed residence. The Supplemental Process, by contrast, uses failure to vote not only to confirm a change in residence, but also in order to make the initial determination that a registrant "may have moved," before a notice has ever been sent. Directive 2015-09, R.42-2, PageID#1588. It makes this determination simply because the registrant has chosen not to vote in a single federal election cycle, and then subjects her to a process that requires her to take affirmative measures to remain on the rolls. The Supplemental Process's reliance on failure to vote initially, to *determine* that a voter may have moved, before a notice is mailed, is not authorized by the procedure described in subsection 8(d), and thus does not fall within subsection 8(b)(2)'s exception. It is therefore prohibited by subsection 8(b)(2).

Petitioner argues "[subsection 8(b)] does not regulate the classes of registrants to whom States send notices as long as they remove registrants under the Confirmation Procedure." Pet. Br. at 37. But subsection 8(b) broadly prohibits any list-maintenance "program or activity" that results in a removal by reason of failure to vote except those described in subsections 8(c) and 8(d). 52 U.S.C. § 20507(b). Determining the "classes of registrants to whom States send notices" that may lead directly to removal from the rolls plainly constitutes part of a list-maintenance "program or activity," and is subject to subsection 8(b)'s restrictions unless specifically exempted. For the reasons already stated, because the Supplemental

Process uses failure to vote alone to determine the "classes of registrants to whom [Ohio] send[s] notices," it does not fall within the exception to subsection 8(b)(2), and it is therefore prohibited.

2. The Confirmation Procedure Is a Means of Confirming Changed Residence, Not a Standalone Removal Program.

Petitioner argues that subsection 8(d) authorizes the state to conclude that a registrant has changed residence solely on the basis of the registrant's failure to respond to a notice and failure to vote in the subsequent two federal election cycles, and to remove the person on that basis. Pet. Br. at 7-8. In his view, subsection 8(d) is not a confirmation procedure but a standalone program that can be used to remove registants at any time, for any reason, or for no reason at all—*even when there is no reason to believe the registrant has moved. Id.* at 26 (NVRA "says nothing about who may receive notices under the Confirmation Procedure" and "does not bar States from sending notices to the entire electorate").[17]

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[17] The United States takes the same position, citing a previous, unenacted version of the NVRA to support its reading of the statute. U.S. Br. at 29. But "unsuccessful attempts at legislation are not the best of guides to legislative intent." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969). Moreover, the earlier version did not contain a clause prohibiting removal programs that use failure to vote. In any event, Congress made clear, in both the law it enacted and the bill it did not pass, that the Confirmation Procedure is to be used only to *confirm* a determination that a registrant has moved. *Compare* 52 U.S.C. § 20507(d) ("State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office *on the ground that the registrant has changed residence* unless" the

This view of subsection 8(d) is contrary to the NVRA's text, purpose, and legislative history. Read in the context of Section 8 as a whole, subsection 8(d) can only be understood as a means of *confirming* a change in residence for which a state has obtained some predicate information indicating such a change, and not as an independent mechanism for *establishing*, without more, that a registrant has moved.

Treating the Confirmation Procedure as a standalone procedure for removing registrants is at odds with its role in the Postal Service program set forth in subsection 8(c). *See* 52 U.S.C. § 20507(c)(1). Subsection 8(c) provides that even when the registrant herself has informed the Postal Service that she has a new address, the state must still "confirm" that information using the subsection 8(d) Confirmation Procedure. *Id.* It would make no sense for Congress to demand that states use the Confirmation Procedure when a state has objective evidence of an address change from the Postal Service, while at the same time authorizing a state to use the Confirmation Procedure as a standalone mechanism to *purge* registrants when it does not have *any* evidence of a change in residence whatsoever. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting interpretation of statute that "would produce an absurd and unjust result which Congress could not have intended" (internal citation and quotation marks omitted)).

Allowing states to remove registrants simply by using subsection 8(d)'s notice procedure with no predicate

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Confirmation Procedure is followed) (emphasis added), *with* S.874, 101st Cong., § 6(d) ("State may, if it determines that a registrant may have changed his residence," use the Confirmation Procedure).

change-of-address information is also contrary to Congress's stated intent in enacting the NVRA. While Congress was "mindful of the need to keep accurate and current voter rolls," it expressed "concern[] that such programs can be abused and may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing." H.R. Rep. No. 103-9, at 15. Yet under Petitioner's interpretation, a state can remove a registrant who fails to respond to a notice and fails to vote before two federal election cycles elapse, with no evidence whatsoever that the registrant has moved and even when state records show that the individual has *not* moved and remains eligible to vote—as was true of Respondent Harmon. *See* Harmon Decl., R.9-4, ¶ 12 (state tax records would show Respondent Harmon had not changed residence). That is inconsistent with "one of the guiding principles of this legislation," namely "to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 19.[18]

It was precisely to put an end to such arbitrary removals that Congress enacted the NVRA and prohibited states from purging eligible registrants. Interpreting subsection 8(d) as Petitioner suggests would allow states to

[18] The United States points to a report by the Congressional Budget Office, which purportedly suggests that the NVRA prohibits states only from dropping non-voters without notice. U.S. Br. at 31. That report is neither legislative history nor authoritative. It was appended to the House and Senate committee reports on the NVRA only as an "estimate of costs" pursuant Congress's internal rules. *See* S. Rep. No. 103-6, at 37; H.R. Rep. No. 103-9, at 21. It does not purport to reflect the views of the enacting legislators on the meaning of the statute's provisions.

remove registrants with no reliable basis for believing they are ineligible, undermining Congress's goal of increasing the number of eligible voters who are registered to vote. A statute should not be interpreted to create a result "that Congress designed the Act to avoid." *King*, 135 S. Ct. at 2493; *see also Postmaster-Gen. of U.S. v. Early*, 25 U.S. 136, 147-48 (1827) (same).

Lastly, Petitioner suggests that the Supplemental Process's reliance on failure to vote is necessary for maintaining accurate voter rolls because using change-of-address information from the Postal Service to identify registrants who may have moved "misses any registrant who moves *without* notifying the postal service." Pet. Br. at 10. But there are many reliable ways to identify registrants who may have moved outside the jurisdiction. The NVRA itself ensures that the "process of updating registration rolls is an ongoing and continuous process," S. Rep. No. 103-6, at 20, by requiring that updating a driver's license "shall serve as [a] change of address for voter registration," 52 U.S.C § 20504(d), and that state public assistance and disability agencies distribute a voter-registration form "with each ... change of address form," *id.* § 20506(a)(6)(A). And the statute also permits states to rely on other sources of information—such as mailings returned as undeliverable, door-to-door canvasses, and interstate sharing of address information from driver's-license and voter-registration lists—to identify voters who may have become ineligible by reason of a change in residence. *See supra* SOC, Part E. There is no need to contort the text of subsections 8(b) and 8(d) to permit using failure to vote to identify voters who may have moved.

II. HAVA CONFIRMS THAT THE SUPPLEMENTAL PROCESS VIOLATES SECTION 8 OF THE NVRA.

Although Petitioner asserts that "HAVA confirms that the NVRA permits Ohio's Supplemental Process," Pet. Br. at 35, the opposite is true. HAVA confirms that the Supplemental Process violates Section 8 of the NVRA. *See* 52 U.S.C. §§ 20507(b)(2), (d)(1); 21083(a)(4)(A).

Petitioner's contention that HAVA "limit[s] the ... scope" of subsection 8(b) of the NVRA, Pet. App. at 21a, is belied by HAVA's text, which states that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to *supersede, restrict, or limit* the application of [the NVRA]." 52 U.S.C. § 21145(a) (emphasis added). HAVA did not change the NVRA's requirements nor expand the reasons by which registrants could be removed from the rolls. Rather, it clarifies that failure to vote may not be used to remove registrants from the rolls.

A. HAVA's Amendment to Subsection 8(b) of the NVRA Clarified, But Did Not Modify, the Statute's Restrictions on List-Maintenance Programs.

HAVA added the provision in subsection 8(b)(2) of the NVRA exempting "the procedures described in subsections (c) and (d)" from subsection 8(b)'s prohibition on list-maintenance programs that "result in the removal of [a registrant] by reason of the person's failure to vote." *Id.* § 20507(b)(2). The amendment was expressly intended to clarify, *not to modify*, the prohibition on removals based

on failure to vote. *See* 116 Stat. 1666, § 903 (section titled "Clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence"). Although subsection 8(d) requires failure to vote to be considered after a notice has been sent—and thus, in a literal sense, "result[s] in the removal" of registrants "by reason of [their] failure to vote," 52 U.S.C. § 20507(b)(2)—the amendment clarifies that this procedure is permissible, notwithstanding subsection 8(b)'s otherwise broad prohibition on list-maintenance programs that rely on failure to vote. The amendment does not exempt any other list-maintenance programs that result in removal by reason of failure to vote.

Petitioner contends that reading the HAVA amendment as a mere clarification of the relationship between (b), (c), and (d) fails to give it "'real and substantial effect.'" Pet. Br. at 35-36 (quoting *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016)). He argues that, to have such effect, the amendment must be construed to limit the scope of subsection 8(b)'s prohibition. Pet. Br. at 40; *but see* 52 U.S.C. § 21145(a) ("nothing in [HAVA] may be construed to ... limit the application of [the NVRA]"). But the "real and substantial effect" of this provision was, as Congress expressly provided, to clarify that the prohibition does not preclude use of failure to vote in accordance with 8(c) and 8(d). *See* 116 Stat. 1666, § 903 (heading).

Had Congress wished to make a substantive change to subsection 8(b)(2), it knew how to do so: HAVA creates one express exception to its savings clause, which otherwise provides that nothing in the statute should be read as superseding the requirements of the NVRA. *See* 52 U.S.C. § 21145(a). The exempted provision, 52 U.S.C. § 21083(b),

amends subsection 6(c) of the NVRA to require that voters who register by mail present identification the first time they vote. *Id.* § 21083(b)(1), (2)(A). Had Congress intended to alter subsection 8(b)(2)'s reach, it could have similarly excluded the amendment to subsection 8(b)(2) from the savings clause. It did not do so. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there."); *see also Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

B. Section 303 of HAVA Confirms the Limited Permissible Use of Failure to Vote as Part of the Confirmation Procedure.

Section 303 of HAVA further confirms Respondents' reading. Subsection 303(a)(4)(A) mandates specific procedures that states must use to maintain their statewide electronic voter-registration lists. 52 U.S.C. § 21083(a)(4)(A). It then states: "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote." *Id.* While the provision reverses the order of the rule and exception as laid out in subsection 8(b)(2), the effect is the same: Failure to vote cannot be the sole basis for presuming a registrant has moved and subjecting the registrant to the Confirmation Procedure.

Petitioner contends that the use of the word "solely" in HAVA saves the Supplemental Process. According to Petitioner, because the Supplemental Process incorporates the subsection 8(d) Confirmation Procedure to remove registrants due to "fail[ure] to respond to a notice *and* ... fail[ure] to vote," it does not remove registrants "solely" due to a failure to vote. *See* Pet. Br. at 39.

There are several problems with this reading. First, it ignores the words "except that." In order for those words to have any effect, there must be some circumstances in which the removal of a registrant "who ha[s] not responded to a notice and who ha[s] not voted in 2 consecutive general elections for Federal office" would constitute a prohibited removal "solely by reason of a failure to vote." In other words, if, as Petitioner argues, a removal for failure to respond to a notice and failure to vote is categorically not a removal "solely by reason of a failure to vote," there would be no reason for the words "except that" in subsection 303(a)(4)(A). The exception would be no exception at all. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.").

Second, subsection 303(a)(4)(A) cannot be read, as Petitioner would have it, as a command to states to remove registrants "who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office"—even if there is no evidence that they moved, or indeed, even if the state knows that they have *not* moved. 52 U.S.C. § 21083(a)(4)(A); Pet. Br. at 38-39. That reading would conflict with the NVRA and with other parts of

HAVA. Moreover, while a literal reading of subsection 303(a)(4)(A) would require removal of a registrant who fails to vote in "2 consecutive general elections," NVRA subsection 8(d) provides that a state shall not remove a registrant unless she "has not voted or appeared to vote ... in *an election during the period* beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice." *Id.* § 20507(d)(1)(B)(ii) (emphasis added). Thus, if a registrant votes only in a local election or a federal primary during this period, she could not be removed under the NVRA but would be required to be removed under HAVA.

Moreover, under subsection 8(b) of the NVRA, a state may only remove a registrant from the official list of eligible voters if she "has not voted *or appeared to vote*" in two consecutive federal general elections. 52 U.S.C. § 20507(b) (emphasis added). Thus, a state is prohibited under subsection 8(b) of the NVRA from removing one who "appeared to vote" in a federal election but did not cast a ballot, but, under Petitioner's interpretation, is *required* to remove that same person under subsection 303(a)(4)(A).

Instead of gutting the NVRA and other provisions of HAVA, the "[t]he better reading of Section 21083(a)(4)(A) is that it is an imprecise reference to the requirements set forth in more detail in Section 20507," U.S. Br. at 26, not a modification of them.

As this Court has stated repeatedly, statutes must be read "in their context and with a view to their place in the overall statutory scheme." *King*, 135 S. Ct. at 2489 (internal quotation marks omitted); *see also Richards*

v. United States, 369 U.S. 1, 11 (1962) (stating that it is "fundamental" in interpreting legislation "that a section of a statute should not be read in isolation from the context of the whole Act"). When subsection 303(a)(4)(A)'s "except" clause is read in context and "consistent with the [NVRA]," its use of the word "solely" simply underscores that failure to vote alone cannot serve to determine a change in residence that the state seeks to confirm using the subsection 8(d) Confirmation Procedure. Rather, "consistent with the [NVRA,]" before using subsection 8(d) to confirm a change in residence, states must have some basis beyond a registrant's failure to vote for believing that she has moved.

C. HAVA's Legislative History Does Not Support Petitioner's Interpretation.

Petitioner and the United States place great weight on selected reports to the states and Congress by the FEC, attempting to use the reports to establish what HAVA's plain language does not—namely, that Congress intended to permit states to use the subsection 8(d) Confirmation Procedure as a standalone program, untethered from Section 8's other limitations. *See* Pet. Br. at 36-38.

But while Petitioner and the United States cite FEC reports that pre-date HAVA's enactment by four years (or more)—and are not part of the legislative record, they ignore the FEC's conclusions in its report to the very Congress that enacted HAVA. In its report on the NVRA to the 107th Congress, the FEC observed that voter lists must "be positively verified rather than passively purged for failure to vote," and identified "two ways to accomplish this task: either running the entire voter list against

the Postal Service's computerized National Change of Address files (NCOA), or else mailing *non-forwardable notices* to everyone on the voter registry," and using any mail returned as undeliverable as evidence of a change in residence. Fed. Election Comm'n, *A Rep. to the 107th Cong.: The Impact of the Nat'l Voter Registration Act of 1993 on the Admin. of Elections for Fed. Office 1999-2000*, at 15 (June 30, 2001) (emphasis added). This was the FEC's understanding of the NVRA's list-maintenance requirements as reported to the enacting Congress; HAVA was introduced just months later, and Congress expressly provided that HAVA made no change to the NVRA's list-maintenance provisions.

In any event, the reports relied upon by Petitioner and the United States simply gathered factual information regarding state practices surrounding the NVRA. One of them also expressly cautioned readers, "It is very important to note ... that the [FEC] does not have legal authority either to interpret the Act or to determine whether this or that procedure meets the requirements of the Act." *Implementing the Nat'l Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples*, R.38-17, at PageID#1114. And the agency that *is* tasked with NVRA enforcement, DOJ, consistently interpreted Section 8 to prohibit purge processes such as Ohio's Supplemental Process—until its sudden reversal in its brief before this Court.

Nevertheless, Petitioner insists that his cherry-picked FEC reports signify that Congress, in enacting HAVA, sought to resolve a "debate" between DOJ and certain states by siding with the outlier states that used subsection 8(d)'s Confirmation Procedure based on a

registrant's failure to vote. Pet. Br. at 36. Petitioner cites not a single mention of such a debate between DOJ and the states in HAVA's legislative history, much less anything from which to conclude that Congress resolved it in favor of particular states and against the position of the agency charged with NVRA enforcement. Rather, as it relates to the NVRA, HAVA's legislative history has a singular bottom line: HAVA does not "undermine [the NVRA] in any way," and the NVRA's procedures to "guard against removal of eligible registrants remain in effect." H.R. Rep. No. 107-730, at 81 (Conf. Rep.); *cf. Weinberger v. Rossi*, 456 U.S. 25, 32-34 (1982) (refusing to read statute contrary to concerns legislators sought to address and in favor of a goal that was not a concern of Congress).[19]

III. NONE OF PETITIONER'S "CANONS OF CONSTRUCTION" PROVIDE A BASIS TO DEFER TO OHIO'S INTERPRETATION OF THE NVRA.

A. The NVRA's Regulation of Registration Procedures Is Authorized by the Elections Clause, and Presents No Constitutional Concerns.

Petitioner argues that "[t]he canon of constitutional avoidance directs the Court to adopt a narrow reading" of the NVRA. Pet. Br. at 17. But "[s]tatutes should be interpreted to avoid *serious* constitutional doubts, not to

[19] The United States also cites a few single member statements. U.S. Br. at 27. But it is axiomatic that "the views of a single legislator ... are not controlling." *Mims v. Arrow Fin. Servs.*, 565 U.S. 368, 385 (2012). In any event, the statements do not compel an alternative interpretation of the relationship between HAVA and Section 8 of the NVRA.

eliminate all possible contentions that the statute might be unconstitutional." *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (internal citation omitted, emphasis in original). The canon has no applicability here, where no serious constitutional issue is raised.

As this Court recently reaffirmed, Congress's authority under the Elections Clause to regulate the "Times, Places, and Manner" of federal elections is "comprehensive," and encompasses the regulation of "registration." *ITCA*, 133 S. Ct. at 2253 (citing *Smiley*, 285 U.S. at 366). Petitioner incorrectly states that this Court "expressly reserved th[e] question" of whether the Elections Clause permits Congress to regulate voter registration, *see* Pet. Br. at 51-52. *ITCA* held that the NVRA properly requires states to register voters who use the federal voter-registration form approved by the Election Assistance Commission. *ITCA*, 133 S. Ct. at 2257. In so ruling, the Court necessarily found that Congress had the authority to set rules for voter registration. *Cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

While *ITCA* conclusively held that Congress may regulate registration, it did reserve the question whether the *particular registration rule* in that case might infringe on a state's authority under the Qualifications Clause to enforce its voter qualifications. *See ITCA*, 133 S. Ct. at 2259. Petitioner suggests that interpreting Section 8 to prohibit the Supplemental Process raises three possible constitutional concerns. None of these is well founded.

First, Petitioner asserts that "Ohio's Supplemental Process at least enforces its power to prescribe a residency qualification." Pet. Br. at 49. To be sure, states may require that voters be residents of the jurisdiction in which they are voting. But Section 8's prohibition on list-maintenance programs that result in the removal of a registrant by reason of her failure to vote does not disturb that unexceptional observation.

In *ITCA*, the Court noted that a registration regulation that "precluded a State from obtaining the information *necessary* to enforce its voter qualifications" could potentially interfere with a state's authority under the Qualifications Clause. *ITCA*, 133 S. Ct. at 2258-59 (emphasis added). That does not mean, as Petitioner suggests, that Congress cannot regulate a registration procedure merely because it is a state's "preferred method" of enforcing its qualifications, Pet. Br. at 50. Under Petitioner's logic, a state's bare assertion that a given registration procedure is necessary to enforce its voter qualifications would be sufficient to override the NVRA. That "would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office.'" *ITCA*, 133 S. Ct. at 2256 (quoting 52 U.S.C. § 20501(b)(1)).

Prohibiting the Supplemental Process in no way prevents Ohio "from obtaining the information necessary to enforce its voter qualifications," and therefore does not raise a constitutional question. *ITCA*, 133 S. Ct. at 2258-59. As explained above, the NVRA leaves many more reliable mechanisms in place for removing registrants who have become ineligible due to changed residence outside the jurisdiction. *See supra* SOC, Part E.

Nor does prohibiting the Supplemental Process preclude Ohio from "requiring voters to confirm their eligibility" as Petitioner contends, *see* Pet. Br. at 50. Indeed, as Petitioner recognizes, the registration process itself was adopted to require eligible citizens to confirm their qualifications in advance of an election, *id.* at 2-3, and there is no dispute that registrants removed under the Supplemental Process have all previously affirmed their eligibility by registering to vote. Moreover, the NVRA permits states to require registrants to reaffirm their residency at the polling place before voting if there is a basis to question the registrant's continued residency in the jurisdiction. 52 U.S.C. § 20507(d)(2)(A) ("If the [8(d)(2) confirmation] card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election.").

Second, Petitioner suggests that registration itself "might" be a qualification, Pet. Br. at 51, citing an 1890 Indiana Supreme Court decision. *Id.* at 53 (citation omitted). But, the possibility that registration "might" be a qualification somewhere other than Ohio is hardly sufficient to trigger the canon of constitutional avoidance in this case. Finally, even if registration were a qualification, there is no question that the registrants improperly removed as a result of the Supplemental Process *were* registered and satisfied all of Ohio's qualifications to vote.

Third, Petitioner suggests that insofar as the NVRA governs registration to vote in presidential elections, it exceeds Congress's authority under the Elections Clause, which extends only to congressional elections. Pet. Br. at 53. This case, however, encompasses a challenge to the

Supplemental Process as used in congressional elections. A ruling on whether Section 8 can also govern presidential elections therefore would have no bearing on the outcome of this case, and the issue therefore is not properly presented for decision, nor was it raised below.

B. Applying the NVRA to Bar the Supplemental Process Does Not Trigger the Clear-Statement Rule or Raise Other Federalism Concerns.

Petitioner argues that "[t]he clear-statement rule also directs the Court to uphold Ohio's Supplemental Process." Pet. Br. at 18. That rule has no application in this case. The clear-statement rule applies only where "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government[.]'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). With respect to regulation of federal elections, however, the Elections Clause has already set the constitutional balance decisively in favor of Congress.

Congressional legislation pursuant to the Elections Clause therefore does not "alter" the existing constitutional balance in any way. Rather, it is well established that whenever Congress legislates under the Elections Clause "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *ITCA*, 133 S. Ct. at 2257. As such, there is no presumption against pre-emption in assessing Elections Clause legislation. *Id.* at 2256-57. And because the clear-statement rule is "based on the presumption against pre-emption," *Gonzales v. Oregon*, 546 U.S. 243, 291 (2006) (Scalia, J., dissenting), it has no application here.

Petitioner cites *Ex parte Siebold*, 100 U.S. 371 (1879), as requiring application of the clear-statement rule in the Elections Clause context. Pet. Br. at 55. *Siebold* did nothing of the sort; to the contrary, like *ITCA*, it recognized that an exercise of Congress's Elections Clause authority would necessarily displace state law, and it presumed that Congress had "endeavored to guard as far as possible against any unnecessary interference with State laws." *Siebold*, 100 U.S. at 393.

Petitioner also invokes the canon that Congress does not hide elephants in mouseholes. Pet. Br. at 27. This canon applies not to Congress's exercise of its *own* constitutionally conferred authority, but instead to delegation of agency power. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). And, even if this canon were applicable outside the regulatory context, it would not assist Petitioner. There was nothing hidden about Congress's intent to displace state voter-registration regulations in enacting the NVRA. *See* S. Rep. No. 103-6, at 2-4 (noting Congress was exercising its authority to "establish[] national voter registration procedures" and displace "restrictive" voter-registration practices). At bottom, this argument is simply another back-door effort to impose a clear-statement rule where none applies.

Finally, Petitioner argues that applying the plain text of the NVRA to prohibit the Supplemental Process would impose a "one-size-fits-all" method for list

maintenance and thus disturb the important role of states as laboratories of democracy. But the NVRA does not mandate a single method for maintaining accurate voting lists. *See supra* SOC, Part E. On the contrary, the NVRA offers substantial flexibility as to what sources of information states may use to identify registrants who have become ineligible due to changed residence. But it prohibits the specific process used by Ohio, because it results in removal of eligible registrants by reason of a failure to vote.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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